(2)

No. 06-1623

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SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MID-ATLANTIC MARKET DEVELOPMENT COMPANY, LLC., *et al.*,

Petitioners,

v.

MORAN FOODS, INC.
d/b/a SAVE-A-LOT, LTD.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Did the Seventh Circuit correctly decide that SAL committed no act of credit "discrimination" under the Equal Credit Opportunity Act by requesting that Susan Camp and her husband Roger both execute personal guaranties for the extension of credit to Roger's business, when the Financial Statement submitted for credit approval reflected the net worth of both Roger and Susan and SAL knew that it included jointly owned assets?

II. Under the ECOA, did SAL's request that Susan Camp execute a personal guaranty void that very guaranty as soon as it was executed?

LIST OF PARTIES (RULE 14.1(b) STATEMENT)

A list of all parties to the proceeding in the court whose judgment is the subject of the Petition is as follows:

Defendants-Appellees and Petitioners: Mid-Atlantic Market Development Company, LLC, Midwest Markets, LLC, Roger V.S. Camp, and Susan Camp.

Plaintiff-Appellant and Respondent: Moran Foods, Inc. d/b/a Save-A-Lot, Ltd.

RULE 29.6 DISCLOSURE STATEMENT

SUPERVALU, Inc. is the sole parent corporation of Respondent Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. No publicly held company owns 10% or more of SUPERVALU, Inc.'s stock.

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STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth as follows:

15 U.S.C.A. § 1691a(b) (West 1998):

> (b) The term "applicant" means any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C.A. § 1691e(a) (West 1998):

> (a) Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to the aggrieved applicant for any actual damages sustained by such applicant acting either in an individual capacity or as a member of a class.

12 C.F.R. § 202.2(e) (1985):

> Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit other than a guarantor, surety, endorser, or similar party.

12 C.F.R. § 202.2(e) (1997):

> Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may become contractually liable regarding an extension of credit. For purposes of §202.7(d), the term includes guarantors, sureties, endorsers and similar parties.

STATEMENT OF THE CASE

Respondent Moran Foods, Inc. d/b/a Save-A-Lot, Ltd. (hereinafter "SAL") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Seventh Circuit's opinion in *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC*, 476 F.3d 436 (7th Cir. 2007). For purposes of this response, SAL incorporates that decision's statement of the facts with the following additional facts relevant to application of the Equal Credit Opportunity Act (hereinafter "ECOA"). Roger Camp testified that the Financial Statement he submitted to SAL for an extension of credit to his businesses accurately reflected both his and his wife Susan's net worth—not just his own. (Supp. App. 5.)[1] He admitted that "a substantial number of the assets" on the Financial Statement "were owned solely or partly by Mrs. Camp." (Supp. App. 10.) The extent of Susan Camp's ownership of assets on the Financial Statement, which showed a net worth of $6.7 million, is as follows:

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[1] All citations to "Supp. App." are to the Supplemental Appendix filed with the Seventh Circuit as a part of Moran's Appellant's Reply Brief and Response on Cross-Appeal.

$775,000	Home in Granger, Indiana purchased and owned solely by Susan
$745,000	Home in Valparaiso, Indiana jointly owned
$315,000	Home in Manitou Beach, Michigan jointly owned
$40,000	Trust Estate, 2034 Marsh Dr., Manitou Beach, Michigan owned solely by Susan
$1,103,000	A collection of stock, bonds, and funds most of which were owned solely by Susan Camp or jointly owned
$1,500,000	Securities in MM Development Company, LLC, a company in which Susan was a partner, were jointly owned
$145,000	Jewelry owned solely by Susan or jointly owned
$135,000	Antiques jointly owned
$85,000	Automobiles jointly owned
$393,000	Personal assets such as a boat and furniture, most of which were jointly owned

(App. 125-27[2]; Supp. App. 4-10.) It was undisputed that SAL believed that the Financial Statement included assets that were jointly owned by Susan Camp. (Supp. App. 10, 16.)

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[2] All citations to "App." are to Moran's Appellant's Appendix filed with the Seventh Circuit.

REASONS FOR DENYING THE PETITION

The Seventh Circuit's decision is correct and does not conflict with any decision of this Court, any other court of appeals, or any other state or federal court.

1. No court has ruled on the validity of the Federal Reserve Board's action, so there is no conflict in decisional law to be resolved.

The Seventh Circuit issued no holding regarding the Federal Reserve Board's authority to extend the ECOA's definition of "applicant" to guarantors of credit. Rather, the Seventh Circuit merely expressed skepticism about it in dicta: "We doubt that the statute can be stretched far enough to allow this interpretation." (Petition, at 10a: *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC*, 476 F.3d 436, 441 (7th Cir. 2007).)[3] What the court of appeals had no uncertainty about, however, was Susan Camp's failure to prove discrimination. (Petition, at 11a: *Moran*, 476 F.3d at 441.) That is the firm and unequivocal reason Susan Camp lost her ECOA claim. The Seventh Circuit made it clear that its discussion of the Board's authority was merely academic: "But even if the Federal Reserve Board's interpretation is authorized, Susan Camp *must lose* because she failed to prove discrimination." (Petition, at 11a: *Moran*, 476 F.3d at 441 (emphasis added).)

The court of appeals' commentary on the Federal Reserve Board's interpretation of "applicant" was neither a "result" of the case nor a "portion[] of the opinion necessary to" the

[3] All citations to the "Petition" are to the Petition for Writ of Certiorari.

result reached. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 66-67 (1996). It is *obiter dictum*. *Id.* The holding, on the other hand, is that Susan Camp "must lose" on her claim for failure to prove discrimination.

The Camps acknowledge the absence of a conflict between holdings of the Seventh Circuit and other federal courts. They admit "the Seventh Circuit stopped short of explicitly ruling that the Federal Reserve Board exceeded its authority in including guarantors within the definition of 'applicant.'" (Petition, at 6.) Nonetheless, the Camps claim that "statements" in the Seventh Circuit's opinion conflict with the Ninth Circuit's decision in *Silverman v. Eastrich Multiple Investor Fund, L.P.*, 51 F.3d 28 (3d Cir. 1995). (Petition, at 6-7.) Beyond this assertion the Camps give no explanation of the alleged conflict.

A review of *Silverman* reveals no conflict. Whereas the Seventh Circuit expressed some doubt about the Board's interpretation of the term "applicant" to include a guarantor, the validity of that interpretation was never even mentioned in *Silverman*. There, both the creditor and the debtor assumed the validity of the Board's interpretation; they disputed only the timing of its applicability. *Silverman*, 51 F.3d at 30-31 ("The parties' dispute on this issue stems from the two dates provided in the [Federal Reserve Board's] amendment . . . ."). The Board's initial interpretation of the term "applicant" specifically *excluded* guarantors. 12 C.F.R. § 202.2(e) (1985), *quoted in Silverman*, 51 F.3d at 31. The Board later revised this interpretation to specifically *include* a guarantor. This revision became effective December 16, 1985, but creditors had the option of complying with the current regulation and existing interpretations, which would remain in effect until October 1, 1986. Revision of Regulation

B,[4] 50 Fed. Reg. 48018 (1985), *quoted in Silverman*, 51 F.3d at 31. Between the revised regulation's effective date (December 16, 1985) and the mandatory compliance date (October 1, 1986), the guarantor in *Silverman* signed the guaranty. The parties disputed whether the new or the old interpretation of "applicant" applied to the guaranty. The Ninth Circuit held that the new, revised interpretation applied because the "expanded definition of 'applicant' was immediately effective as of December 16, 1985." *Silverman*, 51 F.3d at 31.

However, the Ninth Circuit did not rule on, review, discuss, or even allude to the validity of the Board's "expanded definition" of applicant and its creation of a private right of action for guarantors. The validity of the Board's regulation was taken for granted. The same is true in all but one of the five federal district court and five state court cases cited in the Camps' Petition in support of their argument for the existence of a conflict.[5] (Petition, at 7.) None of those cases addresses the authority of the Board to expand Congress's definition of applicant to include "guarantors."

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[4] The Federal Reserve Board has entitled its collection of regulations under the ECOA as "Regulation B." *See* 12 C.F.R. pt. 202 (2005) ("Equal Credit Opportunity Act (Regulation B)").

[5] *Stornawaye Properties, Inc. v. Moses*, 76 F. Supp. 2d 607 (E.D. Pa. 1999); *FDIC v. Medmark, Inc.*, 897 F. Supp. 511 (D. Kan. 1995); *Integra Bank/Pittsburgh v. Freeman*, 839 F. Supp. 326 (E.D. Pa. 1993); *Stern v. Espirito Santo Bank of Florida*, 791 F. Supp. 865 (S.D. Fla. 1992); *Still v. Cunningham*, 94 P.3d 1104 (Alaska 2004); *Cadle Co. v. Vargas*, 771 N.E.2d 179 (Mass. App. Ct. 2002); *Sw. Pa. Reg'l Council, Inc. v. Gentile*, 776 A.2d 276 (Pa. Super. Ct. 2001); *Baybank v. Bornhofft*, 694 N.E.2d 854 (Mass. 1998); *Hammons v. Ehney*, 924 S.W.2d 843 (Mo. 1996); *Douglas County Nat'l Bank v. Pfeiff*, 809 P.2d 1100 (Colo. Ct. App. 1991).

Only one of those cases, *Baybank v. Bornhofft*, 694 N.E.2d 854, 858 (Mass. 1998), mentioned a concern with the Federal Reserve Board's Regulation B, but not the provision at issue here. In *Baybank*, the mother of a borrower co-signed a promissory note for $440,000. The Court reviewed section 202.7(d)(1) of Regulation B, which prohibits a creditor from requiring "the signature of an applicant's spouse *or other person*, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested." 12 C.F.R. § 202.7(d)(1) (emphasis added), *quoted in Baybank*, 694 N.E.2d at 857. In the view of the Supreme Judicial Court of Massachusetts, "[f]orbidding a creditor from requiring the signature of *any* additional person, not just the signature of a spouse, seems to transform the ECOA from an 'equal credit' act into a 'fair credit' statute." *Baybank*, 694 N.E.2d at 858 (emphasis in original). The *Baybank* Court considered the regulation a prohibition on "over-securing loans" because a creditor may have sought additional guarantors of a loan for no discriminatory reason at all. *Id.* Though the court "doubt[ed]" whether the Federal Reserve Board had the "authority to extend Regulation B to cast such a broad net," it did not reach the question. *Id.* None of the parties had briefed or argued the proposition, and the Court relied on a "less drastic" basis to decide the appeal, finding that the mother of the borrower, under the circumstances, was a "joint applicant" for credit. *Id.*

Stated simply, even if the Seventh Circuit had based its ruling on the authority of the Board to expand the definition of "applicant," there would still be no conflict. None of the cases cited by the Camps made any ruling or holding on the authority of the Board to expand the definition of "applicant"

under the ECOA and create a new private right of action in favor of guarantors. In other words, the Seventh Circuit's statements have nothing to "conflict with."

Moreover, if any conflict could be said to exist, it is inchoate and indistinct. So far, only one circuit court of appeals (the Seventh Circuit) has expressed doubts about the Federal Reserve Board's expansion of an ECOA private right of action for guarantors; none of them has issued a holding on the matter. Over time, circuit courts of appeal may rule on the authority of the Federal Reserve Board's action. Those rulings could very possibly reach a consensus instead of creating a conflict. Given that possibility and the need for development in the law, expenditure of this Court's scarce resources now would be premature.

Review by this Court would be untimely for another reason. The Seventh Circuit's doubts about the Federal Reserve Board's grant of an ECOA private right of action for guarantors may well prompt Congress to re-examine the ECOA and Regulation B. *See Flood v. Kuhn*, 407 U.S. 258, 286 (1972) (Burger, J., concurring) ("Courts are not the forum in which this tangled web ought to be unsnarled. . . . [C]ongressional inaction is not a solid base, but the least undesirable course now is to let the matter rest with Congress; it is time that Congress acted to solve the problem.") If the Federal Reserve Board has opened "vistas of liability that the Congress that enacted the Act would have been unlikely to accept,"[6] then Congress should have an opportunity to consider these observations before the this Court applies its energies and time to this issue.

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[6] Petition, at 10a: *Moran*, 476 F.3d at 441.

2. The Seventh Circuit correctly determined that SAL committed no "credit discrimination" against Susan Camp.

The Camps argue in the alternative that the Seventh Circuit's determination that Susan Camp suffered no discrimination "conflicts with the definition of 'discrimination' as defined by 12 C.F.R. § 202.7(d) and as interpreted by the Fourth Circuit Court of Appeals in *Riggs National Bank of Washington, D.C. v. L[i]nch*, 36 F.3d 370 (4th Cir. 1994)."[7] The Camps do not explain how the Seventh Circuit's decision "conflicts with the definition" of discrimination in § 202.7(d). Their argument is undeveloped and unsupported by any cited case law, and it should be rejected.

What the Camps are actually arguing is that the Seventh Circuit misapplied the regulation to the specific set of facts under review. Even if this were true (and it is not), this type of argument "rarely" merits U.S. Supreme Court review. Sup. Ct. R. 10. The Camps request this Court to correct a perceived error that is grounded in the evaluation of the particular facts of this case—a case described by the Seventh Circuit as "a complicated diversity suit."[8] This Court, however, does not sit as an error-correcting court. *Halbert v. Michigan*, 545 U.S. 605, 611 (2005); *Boag v. MacDougall*, 454 U.S. 364, 367-68 (1982) (Rehnquist, J., dissenting) ("In our zeal to provide 'equal justice under law,' we must never forget that this Court is not a forum for the correction of errors.").

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[7] Petition, at 8.

[8] Petition, at 2a: *Moran Foods, Inc. v. Mid-Atlantic Market Development Co., LLC*, 476 F.3d 436 (7th Cir. 2007).

Further, contrary to the Camps' assertion, the opinion below is not in conflict with *Riggs National Bank*. In *Riggs*, Samuel Linch submitted a personal financial statement to a bank that included substantial assets owned jointly with his wife Marcia, a fact which he did not disclose. 36 F.3d at 371. Before closing, however, the bank learned that many of the assets were jointly owned and required that Marcia execute a personal guaranty. *Id.* at 372. According to the Fourth Circuit, the "determinative factual issue was whether Riggs [the bank] had made a determination that Samuel Linch was not independently creditworthy for the requested loan before it required that Marcia also be a personal guarantor of the loan." *Id.* at 374.

Here, contrary to the Camps' assertion (Petition, at 11), the "title" of the financial statement was not "Roger VS Camp." The document was simply titled "Financial Statement." (Appellant's App. 125-27.) The document was much more than Roger Camp's financial statement, it was the financial statement of both Roger and Susan. Roger Camp admitted at trial that "a substantial number of the assets" on the Financial Statement "were owned solely or partly by Mrs. Camp." (Supp. App. 10.) In fact, of the $6.7 million of assets listed on the Financial Statement, over $5.2 million of those assets were owned jointly or exclusively by Susan Camp. (App. 125-27; Supp. App. 4-10.)[9]

Roger did not dispute that the Financial Statement "was, perhaps, a little misleading" (Supp. App. 11); nevertheless he claimed that he did not intend to mislead SAL into thinking

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[9] A complete list of the assets on the Financial Statement which were solely or jointly owned by Susan Camp can be found in the Statement of the Case, *supra*.

that he alone owned all the assets. (Supp. App. 10.) Roger admitted that the Financial Statement "accurately reflected" both Roger and Susan's "net worth"—"not just" his own. (Supp. App. 5.) Moreover, SAL believed that the assets listed on the financial statement were jointly owned (primarily because the statement included residences). (Supp. App. 16.) The Camps do not dispute this fact.

Given that the Financial Statement submitted by Roger Camp contained a "substantial number of the assets" that were "owned solely or partly by Mrs. Camp" and admittedly reflected both Roger and Susan's "net worth," the Seventh Circuit's decision does not conflict with the *Riggs* case—it parallels it. *Riggs*, 36 F.3d at 371. In *Riggs*, just as happened here, the husband submitted a financial statement with a substantial number of assets owned by his wife. *Id.* In *Riggs*, just as happened here, the creditor became aware that "substantial" assets on the Financial Statement were jointly owned. *Id.* at 372. As a result, irrespective of the existence of a company policy on spousal signatures, SAL reasonably required Susan's guaranty. *See Sw. Pa. Reg'l Council, Inc. v. Gentile*, 776 A.2d 276, 283 (Pa. Super. Ct. 2001) ("[T]he mere existence of a policy to require spousal signatures does not necessarily result in an ECOA violation unless that policy was enforced contrary to the principles of the ECOA."). There is no conflict between *Riggs* and the Seventh Circuit's decision because the record shows neither lender discriminated on the basis of sex or marital status.

3. There is no conflict between the Seventh Circuit's decision and any other court on the use of the ECOA as an affirmative defense.

The Camps concede that the Seventh Circuit did not address whether the ECOA can be used as an affirmative defense to void a personal guaranty. (Petition, at 18.) Because the Seventh Circuit determined that SAL did not violate the ECOA in requiring Susan Camp's guaranty, its review of this question was unnecessary. Having suffered no discrimination, Susan could not base an affirmative defense *or* a counterclaim on the ECOA. Thus, if this Court were to accept *certiorari* on this issue, and decide whether an ECOA violation could be raised as an affirmative defense, that decision would have no bearing on Susan Camp's rights and would be purely advisory on an abstract question of law. As this Court has stated, federal courts are "without power to decide moot questions or to give advisory opinions which cannot affect the rights of the litigants in the case before it." *Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am., Div. 998 v. Wis. Employment Relations Bd.*, 340 U.S. 416, 418 (1951). On this basis alone, the Court should deny the Camps' petition.

It was the district court, not the Seventh Circuit, that ruled that Susan Camp could not rely upon the ECOA as an affirmative defense. However, the district court's decision appears in an unpublished, unreported memorandum order. (Petition, at 1.) As such, the district court's decision creates no conflict with any other court on this issue.

More importantly, assuming for the sake of argument that a guarantor has a private right of action under the ECOA, the district court's decision was correct. As between

recoupment and an affirmative defense, the district court rightly concluded that a guarantor's ECOA claim should be considered in the nature of recoupment, not an affirmative defense that entirely voids the guaranty. The weight of federal authority on the subject, the text of Board regulations, this Court's precedent, and simple fairness support the district court's conclusion that the ECOA cannot be used as an affirmative defense.

The district court recognized that the "weight of federal authority" considers a guarantor's ECOA claim as a counterclaim and not an affirmative defense. (Petition, at 43a: district court's April 26, 2002 Memorandum and Order, hereinafter "April 26, 2002 Order"). At least one federal circuit court of appeals has determined that a guarantor's claim of an ECOA violation can be brought within the "recoupment doctrine." *Bolduc v. Beal Bank, SSB*, 167 F.3d 667, 672 (1st Cir. 1999); *Mayes v. Chrysler Credit Corp.*, 167 F.3d 675, 677 (1st Cir. 1999). Recoupment reduces or eliminates damages; it does not provide any other form of relief. *Bolduc*, 167 F.3d at 672 n.4; *see also Mayes*, 167 F.3d at 677. Recoupment is a common law doctrine that "has largely been superseded by the counterclaim provisions of the Federal Rules of Civil Procedure." *Mayes*, 167 F.3d at 677. At least seven other published federal decisions have also concluded that a guarantor's ECOA claim presents a counterclaim, not an affirmative defense.[10]

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[10] *FDIC v. 32 Edwardsville, Inc.*, 873 F. Supp. 1474, 1480-81 (D. Kan. 1995); *FDIC v. Skotzke*, 881 F. Supp. 364, 368 (S.D. Ind. 1994); *Resolution Trust Corp. v. Schonacher*, 844 F. Supp. 689, 695-96 (D. Kan. 1994); *Riggs Nat'l Bank of Washington, D.C. v. Linch*, 829 F. Supp. 163, 169 (E.D. Va. 1993), *aff'd*, 36 F.3d 370 (4th Cir. 1994); *CMF Va. Land v. Brinson*, 806 F. Supp. 90, 95 (E.D. Va. 1992); *Diamond v. Union Bank & Trust*, 776 F. Supp. 542, 544 (N.D. Okla. 1991).

There are good reasons why many courts have not permitted a guarantor to assert an ECOA violation as an affirmative defense. First, Congress designed the ECOA's private right of action to allow an "applicant" who is *denied* credit as a result of discrimination to seek actual damages for the denial. The ECOA contains no text which would indicate that Congress intended such rights to extend to guarantors when credit was *granted*. As the district court noted, the ECOA's private right of action is "a sword, not a shield." (Petition, at 44a: April 26, 2002 Order). Furthermore, the statutory term "'[u]pon application by an aggrieved applicant,'" suggests a civil action initiated by the applicant, not an affirmative defense that vitiates the underlying credit obligation. (Petition at 45a: April 26, 2002 Order (alteration in original) (quoting 15 U.S.C. § 1691e(c))).

The district court examined the Board's regulations for an indication as to the intent of the Board when it extended ECOA claim rights to guarantors, but could find no evidence that the Board intended that right to be in the form of an affirmative defense. Finding no support for an affirmative defense in the statutory text, the legislative purpose and history, or the regulatory process, the district court properly abided by this Court's admonition that "[c]aution must temper judicial creativity in the face of legislative and regulatory silence." (Petition, at 46a: April 26, 2002 Order (quoting *S. Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336, 345 (1982))). When "comprehensive regulation" is at issue, agency silence on the availability of an affirmative defense "must be deemed significant." *S. Pac. Transp.*, 456 U.S. at 345.[11] If the Board

[11] In *Southern Pacific*, this Court held that: (1) absence of an affirmative-defense provision in Interstate Commerce Commission's "credit regulations," (2) legislative and administrative history of the credit regulations, and (3) public policy concerns "disfavor[ed] judicial implication of affirmative defenses based on carrier violations of the Commission's credit regulations." 456 U.S. at 345, 346, 348, 352.

had intended to create not just a new private right of action in favor of guarantors for actual damages, but an affirmative defense based on a violation of its regulations, it would have done so explicitly.

Finally, the conclusion that the Board's ECOA regulations do not grant a guarantor an affirmative defense is supported by the drastic and draconian result of such an interpretation: the effective cancellation of a multi-million dollar debt. The district court realized that allowing the guarantor an affirmative defense would "never" invalidate the applicant's obligation. (Petition, at 42a: April 26, 2002 Order.) However, in many spousal cases, including this one, the applicant is "judgment proof," and the creditor's only recourse is the spousal guarantor.[12] Invalidating such guaranties would, in effect, cancel the entire debt, as is the case here.

The ECOA was not intended to promote debt repudiation. Its purpose was and remains to require equal access to credit by creditworthy individuals. The district court's decision that claims under the ECOA were never intended to be used as an affirmative defense to eliminate debt was correct.

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[12] This of course explains why spousal guaranties are often requested before credit is extended, especially when the creditworthiness of the applicant is based upon assets owned solely or jointly by the applicant's spouse.

4. Susan Camp had no private right of action under the ECOA to assert either a counterclaim for recoupment or an affirmative defense.

The district court's decision regarding the nature of a spousal guarantor's ECOA claim (i.e., counterclaim for recoupment rather than affirmative defense) assumed the validity of the Board's extension of the term "applicant" to spousal guarantors, and the creation of a new private right of action in favor of such guarantors. (Petition, at 41a: April 26, 2002 Order.) Because the ECOA confers no private right of action to spousal guarantors, no distinction between recoupment and an affirmative defense was necessary. The Seventh Circuit's doubts about the Board's authority to extend ECOA claims to spousal guarantors were well-founded.

Congress enacted the ECOA in 1974 to end creditor discrimination against women who were independently creditworthy. Courts have recognized that "one, perhaps even the main, purpose of the ECOA was to eradicate credit discrimination waged against women, especially married women whom creditors traditionally refused to consider apart from their husbands as individually worthy of credit." *Capitol Indem. Corp. v. Aulakh*, 313 F.3d 200, 202 (4th Cir. 2002). To that end, the ECOA forbids discrimination that "materially affects an applicant's ability to *obtain the desired credit*." *Haynie v. Veneman*, 272 F. Supp. 2d 10, 19 (D.D.C. 2003) (emphasis added). To ensure equal access to credit, the ECOA requires creditors to provide reasons for adverse actions on credit applications, delegates regulatory and enforcement authority to the Board, pre-empts discriminatory state laws, and establishes a private right of action for applicants who are denied credit because of unlawful discrimination. 15 U.S.C.A. §§ 1691, 1691b, 1691c, 1691d, 1691e (West 1998).

However, only an "aggrieved applicant" can avail herself of the ECOA's private right of action: "Any creditor who fails to comply with any requirement imposed under this subchapter shall be liable to *the aggrieved applicant* for any actual damages *sustained by such applicant* . . . ." 15 U.S.C.A. § 1691e (emphasis added). Congress defined an "applicant" as:

> any person who applies to a creditor directly for an extension, renewal, or continuation of credit, or applies to a creditor indirectly by use of an existing credit plan for an amount exceeding a previously established credit limit.

15 U.S.C.A. § 1691a(b) (West 1998). Congress did *not* include a guarantor within the definition of "applicant."

Under the ECOA, Congress granted a cause of action only to aggrieved applicants who sought but were denied credit, and suffered discrimination during the application process. Initially, the Board adhered to the text of § 1691a(b) and defined "applicant" in Regulation B (the Federal Reserve Board's set of regulations prescribed under the ECOA) to expressly *exclude* a "guarantor":

> "Applicant means any person who requests or who has received an extension of credit from a creditor, and includes any person who is or may be contractually liable regarding an extension of credit *other than* a guarantor, surety, endorser, or similar party."

12 C.F.R. § 202.2(e) (1985) (emphasis added), *quoted in Baybank v. Bornhofft*, 694 N.E.2d 854, 856 (Mass. 1998); *see also Mayes v. Chrysler Credit Corp.*, 37 F.3d 9, 11 (1st Cir. 1994) (citing the original version of 12 C.F.R. § 202.2(e), which defines "applicant").

In 1985, the Board took the opposite approach and revised Regulation B to *include* "guarantors, sureties, endorsers, and similar parties" in the definition of "applicant." In doing so, the Board improperly expanded Congress's definition and granted "applicant" status to spousal guarantors who are not seeking or applying for credit themselves. In commentary explaining its 1985 revisions, the Board announced: "The revised definition of applicant gives legal standing to guarantors and like parties (enabling them to sue for violations of the regulation's signature rules) but imposes no new requirements on creditors." Revision of Regulation B, 50 Fed. Reg. 48018, 48018 (Nov. 20, 1985). The Board recognized that it was expanding the reach of the ECOA beyond the clear limitations established by Congress:

> The principal effect of the change is to give guarantors and similar parties standing to seek legal remedies when a violation occurs under § 202.7(d). The regulation prohibits creditors, in certain situations, from requiring the signature of an applicant's spouse as a guarantor, surety, cosigner, or similar party. If a creditor violates this provision, however, *a guarantor whose signature has been illegally required currently has no legal remedy because section 706 of the act confers standing to sue only upon an "aggrieved applicant."* The Board has included guarantors and similar parties within the definition of "applicant" to resolve this question of standing.

Revision to Regulation B, 50 Fed. Reg. 48018, 48020 (Nov. 20, 1985) (emphasis added). Thus, the Board expressly stated that Congress had not granted a private right of action to spousal guarantors, and decided that it would do so on its own authority. *Id.*

There are two fundamental problems with the Board's action. First, Congress had already specifically defined an "aggrieved applicant" and had established the limits of the private right of action it had created in the ECOA. The Board's regulation, however, would extend this private right of action to *non*-applicants, such as guarantors like Susan Camp, even though there is no indication that Congress ever intended for non-applicants to enforce ECOA claims. The Board need not have done so. This is not a case of congressional silence in need of agency gap-filling or one of statutory ambiguity in need of agency interpretation. *See Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-843 (1984). The Federal Reserve Board itself recognized that § 1691e granted standing "only" to aggrieved applicants. Thus, the Board effectively overruled Congress's decision to limit the scope of persons permitted to bring a private action under the ECOA. The Board's grant of standing to non-applicant guarantors is, therefore, invalid and unenforceable. Because Susan Camp was merely a guarantor, she was not denied credit by SAL and she was not discriminated against by SAL. Therefore, she is not an "aggrieved applicant" and has no private right of action under the ECOA.

The second fundamental problem with the Board's action is that it results in an unreasonable construction of the ECOA. *See Chevron*, 467 U.S. at 842-843. Textually, the ECOA makes clear that an applicant "applies for credit." 15 U.S.C.A. § 1691a(b). To sign a guaranty is not to apply for credit. Susan Camp's signature on the guaranty did not initiate a credit request; it was merely a promise to stand behind credit for which another person applied. She was not an applicant under the ECOA and, therefore, had no private right of action.

The Board's expansion of the ECOA has led to inherent inconsistencies. On the one hand, the Board expanded the definition of "applicant" to grant guarantors a private right of action for violations of § 202.7(d)(1). 12 C.F.R. § 202.2(e). On the other hand, § 202.7(d)(1) specifically *allows* creditors to require the signature of spousal joint applicants on credit instruments:

> [A] creditor shall not require the signature of an applicant's spouse or other person, other than a joint applicant, on any credit instrument if the applicant qualifies under the creditor's standards of creditworthiness for the amount and terms of the credit requested.

12 C.F.R. § 202.7(d)(1) (1997).

Thus, if Susan Camp was an "applicant" because she was a guarantor, one must conclude that she was a "joint applicant" under § 202.7(d)(1), which would permit SAL to require her signature on a credit instrument. However, a staff interpretation of § 202.7(d)(1), insists that "a person whose signature is required by the creditor as a condition for granting the credit requested" (i.e., a guarantor) is *not* a joint applicant. 12 C.F.R. pt. 202, supp. I, para. 7(d)(1) (1997). So, according to the logic of the regulations, Susan Camp is an "applicant" with standing to pursue an ECOA claim but *not* an "applicant" whose signature SAL had the right to require. This illogical outcome directly contradicts Congress's intent that an ECOA private right of action extend only to applicants refused credit because of sex, marital status, or other prohibited basis.

Finally, inconsistencies such as this inevitably allow guarantors to escape debt. The Board's expansion of a private right of action beyond that intended by Congress has spawned significant growth in ECOA litigation. The number of spousal-signature cases "increased dramatically" after the Board expanded the definition of applicant to include guarantors. Mary Dee Pridgen, *Consumer Credit and the Law* § 3:4 (2004). The Board's action, along with application of the ECOA to business loans, has caused "a significant amount of litigation." *Id.* Courts have also noted the increase in ECOA spousal signature cases. *See CMF Va. Land, L.P. v. Brinson*, 806 F. Supp. 90, 96 (E.D. Va. 1992). Use of the ECOA is now "widespread," as husbands and wives assert claims and defenses "not to obtain deserving credit or to remedy past 'discrimination' but as a last-ditch effort to prevent a lender from obtaining a quick entry of judgment against them." Andrew B. Lustigman & Alicia M. Serfaty, *The Equal Credit Opportunity Act as a Defense Against Payment: How Lenders Can Strike Back*, 111 Banking L.J. 444, 444-45 (1994). These litigants corrupt the purpose of the ECOA by targeting the credit obligation instead of credit discrimination. *Id.* There is no indication that Congress intended to effect such a dramatic change in the law or granted the Federal Reserve Board leave to do so.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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